Treasure Comments

From: Nathan Hult <nathanhult@gmail.com>
Sent: Monday, August 07, 2017 5:40 PM
To: Treasure Comments
Cc: Nicole Deforge; THNC
Subject: Treasure Hill - issues addressed in Burnett Memorandum
Attachments: TreasureHillLtr8-7-17.pdf

Dear Mr Astorga,

Attached is a letter addressing the Treasure Hill conditional use permit and the issues addressed in the Cody Burnett memorandum of April 22, 2009 as applied to the current state of the review process.

Thanks.

Nathan Hult, attorney

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August 7, 2017

Re: Treasure Hill Conditional Use Permit Application

To the Park City Planning Commission:

I am writing to you on behalf of myself, my wife, and other similarly situated residents of Old Town who live on Lowell Avenue and will be most affected by the Treasure Hill proposal. In particular, I am addressing the Memorandum of Jody Burnett to this commission dated April 22, 2009 and the incomplete legal analysis and some of the unsubstantiated conclusions he provides in that memorandum. This is particularly important as this memorandum is contained on the city's website related to this matter and has been mentioned in comments by various member of the Park City government suggesting a belief in limited options for the city. It is possible that Cody Burnett was not cognizant of the fact that the applicant had substantially expanded the scope and character of the project, as he concludes that the Sweeney MPD has vested rights of continuing validity in compliance with the parameters and conditions adopted as part of the **original** (emphasis added) MPD approval.

Cody Burnett provides an inadequate analysis of the application of the Utah Supreme Court opinion of its leading case in this area, Western Land Equities, Inc v. City of Logan, 617 P.2nd 388 (Utah 1980) as applied to the facts of this Treasure Hill application. While the case clearly established that certain rights become vested at the time of the approval of a development application, that case dealt only with a fact situation where the developer was seeking to proceed with development **exactly** as had been approved in the original plan.

Neither that case, nor any after it have recognized a vested right in connection with revised plans that substantially change the size or character of the development. The original plan was approved October 16, 1986. In 2009, a new or modified Treasure Hill plan was presented to the Commission that substantially changed the character of the development from a condominium complex to a conference and hotel development. The size more than doubled. This is a substantial deviation from the plan that was approved. Given this fact, the applicant could be found to have waived or abandoned the original application and any rights pertaining to it. The Burnett memorandum is totally lacking in any discussion or analysis of the status of any vested rights where the applicant has substantially altered the plan from what was approved.

The Burnett opinion also attempts to address the question of what standard should apply in the vesting context, to the calculation of additional support commercial and/or meeting space, a ploy that Treasure Hill is using to attempt to rationalize the expansion in size from the original proposal, without recognizing that such additional calculation has no relevance where the approved plan was for condominiums and not for a conference and hotel center. All support function space necessary for a condominium complex was already included in the original plan.

The second issue that is inadequately addressed by the Burnett memorandum is that of the requirement of due diligence. If the Sweeneys have not exercised due diligence in pursuing their approved development plan, any vested rights lapse and are unenforceable. Burnett refers to extensive materials that have been submitted for the final phase of the project together with numerous meetings with the Planning Commission and continuing dialog with staff in support of his conclusion that applicant has exercised due diligence. The memorandum contains no appendix as to when these meetings occurred or what they were about. Nor does the opinion address the most significant issue of whether these hearings and discussions were addressing the project as proposed in the original plan or were attempts to significantly expand the project as presented in 2009. Nor is there a discussion as to whether these activities were continuous over the 23 years between 1986 and 2009.

Then there is the additional lapse in time between 2009 and the newly revised proposal in 2016, an additional 7 years, none of which pertained to the approved plan but to one with additional significant alterations and expansions. This in itself could constitute a lapse or abandonment of the vested rights.

The Burnett memorandum also mentions but fails to adequately address the requirement that in evaluating any vested rights, they are subject to issues of public health and safety. These principles were originally established as a matter of common law in Utah and codified in the Municipal Land Use, Development, and Management Act at Utah Code 10-9a-507(2)(b) which provides that "if the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use may be denied." Whatever vested rights may still remain if any would be subordinate to any substantial negative impacts that such a development would have on the health and safety of the surrounding community. Rather than providing plans for mitigating any negative impacts of the original plan presented in 1985, the applicant has instead produced plans which will add substantial additional negative impacts to the health and safety of the adjacent community.

One additional issue raised by the Burnett memorandum is that the part performance on the part of the Sweeneys of what is characterized as the quasi-contractual elements of the original MPD approval, and the principal of equitable estoppel, may, in addition to the legal principals established by the Western Land Equities case, require the city to honor the original MPD approval. However, at most, if

it is deemed that that original MPD plan has not been abandoned, the applicant would be entitled to proceed only with that original plan, not to the enlarged and distorted plans that have been presented since then.

In conclusion:

1. Any vested right of the applicant is limited to the original plan that was approved in October, 1986.

2. The Planning Commission may find, as the finder of fact, that the applicant has not exercised due diligence, but has waived and abandoned those vested rights by substantial periods of inaction in completing the plan in those 31 years between 1986 and 2017, and/or has waived and abandoned those rights by submitting and pursuing new plans substantially different as to size and character from those originally approved.

3. The applicant may have waived any rights based on theories of part performance and equitable estoppel, but at most would be entitled to completion of the plan originally approved in 1986.

4. The Planning Commission's primary obligation is to the public health and safety of the affected community, and if the anticipated detrimental effect of the new and enlarged project, for which there are no vested rights, can't be successfully mitigated, the proposal should be denied.

Sincerely,

Nathan Hult

Nathan Hult, attorney